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5 IN THE UNITED STATES DISTRICT COURT  
6 EASTERN DISTRICT OF WASHINGTON

7 UNITED STATES OF AMERICA,

8 Plaintiff,

9 vs.  
10

11 JAMES DEAN CLOUD,

12 Defendant.  
13  
14

NO: 1:19-CR-2032-SMJ-1

GOVERNMENT'S NOTICE OF  
INTENT FRE 609

15  
16 COMES NOW the Plaintiff, United States of America, by and through the  
17 United States Attorney for the Eastern District of Washington, William D. Hyslop,  
18 and Assistant United States Attorneys, Thomas J. Hanlon and Richard C. Burson, and  
19 herein discloses the Government's intent to introduce evidence pursuant to Federal  
20 Rule of Evidence 609 as follows:

21 As pertinent, Rule 609(a) of the Federal Rules of Evidence provides as follows:  
22 The following rules apply to attacking a witness's character for truthfulness by  
23 evidence of a criminal conviction:  
24 (1) for a crime that, in the convicting jurisdiction, was punishable by death or by  
25 imprisonment for more than one year, the evidence:

26  
27 Government's Notice of Intent  
28 FRE 609

1 (B) must be admitted in a criminal case in which the witness is a defendant, if the  
2 probative value of the evidence outweighs its prejudicial effect to that defendant; and  
3 (2) for any crime regardless of the punishment, the evidence must be admitted if the  
4 court can readily determine that establishing the elements of the crime required  
5 proving-or the witness's admitting-a dishonest act or false statement.

6 For purposes of impeachment, the Government intends to elicit on cross-  
7 examination and, if necessary, through public records, the following prior felony  
8 convictions:

- 9 1) On or about July 21, 2010, Defendant committed the offenses of Count 1,  
10 Crime on Indian Reservation - Burglary and Count 2, Possession of Stolen  
11 Firearms, both felony offenses, and Defendant was convicted of such felony  
12 offenses on March 1, 2011, in the United States District Court – Eastern  
13 District of Washington, in Cause Number 2:10-CR-2077-RMP-1. On  
14 September 1, 2016, the Defendant was resentenced to credit for time served  
15 (2,232 days in prison). On November 17, 2016, the defendant was  
16 sentenced to two months in jail for a supervised release violation. On July  
17 11, 2017, the defendant was sentenced to three months in jail for a  
18 supervised release violation and his supervision was terminated.
- 19 2) On or about August 18, 2008, Defendant committed the offenses of Count 1,  
20 Attempt to Elude Police Vehicle, and Count 2, Possession of Stolen Vehicle,  
21 both felony offenses, and Defendant was convicted of such felony offenses  
22 on December 4, 2008, in the Superior Court for Yakima County, in Cause  
23 Number 08-1-01650-7. As to Count 2, Defendant was sentenced to 25  
24 months confinement. On January 15, 2019, Defendant began a term of  
25 community confinement. After multiple sanctions, on June 17, 2010,  
26 Defendant was sentenced to 60 days in jail.

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3 ARGUMENT

4 The Ninth Circuit has outlined five factors that should guide the district court's  
5 decision whether to admit evidence under Rule 609(a)(1):

- 6 1. the impeachment value of the prior crime  
7 2. the point in time of the conviction and the witness' subsequent history  
8 3. the similarity between the past crime and the charged crime  
9 4. the importance of the defendant's testimony  
10 5. the centrality of the credibility issue

11 See *United States v. Cook*, 608 F.2d 1175, 1185 n. 8 (9th Cir. 1979)(en banc);  
12 see also *United States v. Wallace*, 848 F.2d 1464, 1473 n. 12 (9th Cir. 1988).

13 Although the trial judge is not required to state his or her analysis of each of the five  
14 factors with special precision, "the record should reveal, at a minimum, that the trial  
15 judge 'was aware of the requirements of Rule 609(a)(1).' " *Wallace*, 848 F.2d at 1473  
16 (quoting *United States v. Givens*, 767 F.2d 574, 579 80 (9th Cir. 1985)).

17 Evidence of a prior conviction may be admitted for impeachment purposes if the  
18 probative value outweighs the prejudicial effect of admission. *United States v.*  
19 *Martinez-Martinez*, 369 F.3d 1076, 1088 (9th Cir. 2004), citing, *United States v.*  
20 *Cook*, 608 F.2d 1175, 1185 (9th Cir. 1979)(en banc), overruled on other grounds, *Luce*  
21 *v. United States*, 469 U.S. 38 (1984). "Rule 609(a)(1) presumes that all felonies are at  
22 least somewhat probative of a witness's propensity to testify truthfully." *United*  
23 *States v. Estrada*, 430 F.3d 606, 617 (2d Cir. 2005). "When a defendant takes the  
24 stand and denies having committed the charges offenses, he places his credibility  
25 directly as issue." *United States v. Alexander*, 48 F.3d 1477, 1489 (9<sup>th</sup> Cir.  
26 1995)(citations omitted).

1 In *Martinez-Martinez*, the defendant was charged with attempted illegal reentry  
2 into the United States. *United States v. Martinez-Martinez*, 369 F.3d at 1078. At trial,  
3 the Government was permitted to impeach the defendant with his seven-year-old  
4 felony conviction for possession of marijuana for sale. In considering whether to  
5 permit the Government to use the prior conviction, the district court found that  
6 credibility, specifically “the defendant’s character for honesty, is a factor that will be  
7 weighed by the jury in this case.” *Id.* at 1088. The district court then allowed the  
8 Government to impeach the defendant with his “sanitized” felony conviction. *Id.* The  
9 Ninth Circuit found that the district court did not abuse its discretion in allowing the  
10 prior conviction as impeachment of the defendant’s testimony. *Id.*

11 In the present case, the credibility of the Defendant, if he chooses to testify, is  
12 of paramount importance. The jury should have all the information, including the  
13 Defendant’s prior felony convictions, which reflect on the Defendant’s credibility.

## 14 CONCLUSION

15 It is requested that this Court determine whether the probative value of the  
16 Defendant’s prior conviction evidence outweighs the possibility of prejudice. The  
17 facts of the present case indicate that credibility of the Defendant is likely to be a  
18 paramount issue. Thus, if the Defendant intends to exercise his right to testify in  
19 support of his case, it would be unfair and misleading to the jury to allow the  
20 Defendant to appear as a pristine and innocent witness who lacks any previous  
21 criminal background. In such circumstances, the Defendant’s prior convictions are  
22 probative of credibility.

23 For the foregoing reasons, the Government requests that this Court allow the  
24 Government to use the Defendant’s prior felony convictions as impeachment evidence  
25 should he testify at trial. If the defendant chooses to testify at trial, the Government  
26 seeks to impeach the defendant with the felony criminal convictions noted above,  
27 Government’s Notice of Intent  
28 FRE 609

1 which satisfy the five requirements, and in which the probative value outweighs any  
2 prejudicial effect.

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5 Respectfully submitted this 16th day of January, 2020.

6 William D. Hyslop  
7 United States Attorney

8 s/ Thomas J. Hanlon  
9 THOMAS J. HANLON  
10 Assistant U.S. Attorney

11  
12 s/ Richard C. Burson  
13 RICHARD C. BURSON  
14 Assistant U.S. Attorney

15  
16  
17 I hereby certify that on January 16, 2020, I electronically filed the foregoing  
18 with the clerk of the Court using the CM/ECF System which will send notification of  
19 such filing to the following: John B. McEntire, IV., Jeremy B. Sporn, Lorinda  
20 Youngcourt.  
21

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